Nos. 06-340 and 06-549

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IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
Petitioners,

v.

DEFENDERS OF WILDLIFE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ARIZONA POWER AUTHORITY, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SAN DIEGO COUNTY WATER AUTHORITY, AND WESTERN URBAN WATER COALITION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

VIRGINIA S. ALBRECHT
Counsel of Record
KARMA B. BROWN
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

KATHY ROBB
HUNTON & WILLIAMS LLP
200 Park Avenue
New York, NY 10166
(212) 309-1128

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INTERESTS OF *AMICI CURIAE*

Whether Section 7(a)(2) of the Endangered Species Act ("ESA" or "the Act") applies to federal agency action is of exceptional national importance and directly critical to agencies, such as *Amici*, who are responsible for delivering water and power to tens of millions of people, nationally significant agricultural and business interests, and States. All parties have consented to the filing of this Brief.[1]

Reading Section 7(a)(2) to apply to the nondiscretionary delegation of Clean Water Act ("CWA") permitting authority to the States and, by extension, to arguably trump the long-standing allocations of water governed by law, treaty, and various agreements would have devastating implications for future western water and power operations. *Amici* Arizona Power Authority, Central Arizona Water Conservation District, Imperial Irrigation District, the Metropolitan Water District of Southern California, and San Diego County Water Authority provide water and power to municipalities, public agencies, irrigation and power districts, and tribal entities. These agencies in turn provide water and power directly to homes, businesses, and other retail customers. *Amicus* Western Urban Water Coalition is an association of municipal water suppliers in six states serving the water and power needs of over 35 million people in the major metropolitan areas of the west.

Amici operate in States that hold delegated CWA permitting authority and are therefore concerned about the interplay between the CWA and the ESA. *Amici* are also concerned that the decision below could undermine *Amici's*

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[1] The letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6 of this Court, *Amici* state that their counsel authored this brief and *Amici* paid for it. This brief was not written in whole or in part by counsel for a party to these cases, and no one other than *Amici* made a monetary contribution to its preparation.

water and power entitlements. If applied to *Amici's* entitlements, the decision could require the Bureau of Reclamation ("Reclamation") to ignore a Fish & Wildlife Service ("FWS") regulation, 50 C.F.R. § 402.03, which limits ESA consultation to discretionary agency actions, and could ultimately require the Secretary to divert water in contravention of *Amici's* contracts. Such an outcome would vitiate the security *Amici* have in the decrees, agreements, contracts, and permits that underlie their water and power entitlements. These interests are paramount to *Amici* and the millions of Americans in the west who rely on them for water and power services.

A. Arizona Power Authority

Arizona Power Authority ("APA") is a corporate and political body of the State of Arizona established by the legislature in 1944. ARIZ. REV. STAT. §§ 30-101 *et seq.*, §§ 45-1701 *et seq.* The APA is responsible for acquiring and marketing the State of Arizona's 377 megawatt share of power from Hoover Dam and then transmitting this power over the Parker-Davis and Pacific Intertie transmissions systems.

The APA serves 32 wholesale customers, including towns, irrigation, water and electrical districts throughout Arizona, with power—electrical energy generated from the flow of the Colorado River—from the Hoover Dam. Any interruption or diminution of the delivery of water downstream of Hoover Dam would significantly impact the APA's delivery of power to its customers because less water through the dam will result in less power output.

B. Central Arizona Water Conservation District

This Court's decree in *Arizona v. California* confirmed Arizona's right to consumptively use 2.8 million acre-feet

("maf")[2] of Colorado River water annually. *Arizona v. California*, 373 U.S. 546, 577 (1963) (opinion) and 126 S. Ct. 1543 (2006) (amended decree) (hereinafter "Decree"). Despite the Decree, however, Arizona could not fully use its Colorado River water because it lacked a water delivery system capable of transporting Colorado River water to the more populated regions of central and southern Arizona. Accordingly, in 1968, Congress enacted the Colorado River Basin Project Act, which authorized the Secretary of the Interior ("Secretary") to construct the water delivery system known as the Central Arizona Project ("CAP"). 43 U.S.C. §§ 1501, *et seq.* ("Basin Project Act").

In order to provide for CAP operation and repayment, the Basin Project Act also gave the Secretary the authority to enter into a master contract with an Arizona organization having the power to levy assessments against all taxable real property within its boundaries. 43 U.S.C. § 1524(b)(1). In response, the Central Arizona Water Conservation District ("CAWCD") was formed in 1971 as a political subdivision of the State of Arizona. ARIZ. REV. STAT. §§ 48-3701, *et seq.* CAWCD comprises Maricopa, Pinal and Pima counties and encompasses roughly 80 percent of Arizona's water users and taxpayers. In 1972, CAWCD entered into a master contract with the Secretary, providing for the repayment of reimbursable CAP construction costs and the delivery of the CAP water supply. CAWCD is responsible for operating and maintaining the CAP aqueduct system and repaying Arizona's share of CAP construction costs.

Pursuant to the Basin Project Act, its own Arizona enabling legislation, and the master contract, CAWCD has entered into

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[2] An acre-foot equals 325,851 gallons—the amount of water needed to cover one acre of land with water one foot deep. One acre-foot of water can supply the household needs of a four-person family for one year.

numerous subcontracts for delivery of CAP water supplies to agricultural irrigation districts and municipal and industrial entities in central and southern Arizona. CAWCD's sub-contractors include the cities of Phoenix, Tucson, Scottsdale, Mesa, Peoria, Glendale, Tempe and Chandler, all of which depend upon the delivery of Colorado River water by means of the CAP. In 2004, CAWCD delivered over 1.5 maf of Colorado River water to agricultural, municipal, and tribal entities served by the CAP. Overall, Colorado River water delivered by the CAP makes up about one-third of Arizona's annual renewable water supplies.

C. Imperial Irrigation District

With more than 3,000 miles of canals and drains, the Imperial Irrigation District ("IID") is the largest irrigation district in the United States in terms of water usage. Situated along the southern California border with Mexico, growers within IID farm about one-half million acres with 3.1 maf of water per year. The economic value of the crops produced in the Imperial Valley routinely exceeds $1 billion annually. In the winter months, most of the winter vegetables consumed within the United States come from the Imperial Valley and the nearby Yuma Valley.

Of the water IID transports, approximately 97 percent is used for agricultural purposes, supporting Imperial County's ranking as one of the top ten agricultural regions nationwide. The remaining three percent of its water deliveries supply seven municipalities, one private water company and two community water systems, as well as a variety of industrial users and rural homes or businesses.

IID's electrical division, IID Energy, serves over 130,000 residential, commercial, and industrial customers in the Imperial and Coachella Valleys. Because IID's delivery system is based on gravity flow, IID generates a substantial amount of electrical energy with Colorado River water.

Combining hydroelectric power with other sources has made IID the fifth largest electrical utility in the State of California.

Settlement and development of the Imperial Valley began in the late 1800s and eventually involved an earthen water delivery canal from the area of Yuma, Arizona following the gravity path through northern Baja California, Mexico, and back up into the Imperial Valley. As a result of the large demand for irrigation water resulting from the year-round growing season, Congress enacted the Boulder Canyon Project Act of 1928 ("BCPA"), 43 U.S.C. §§ 617-617t, which provided for the construction of Hoover Dam and the All American Canal ("AAC"). The AAC is a very large water supply canal that runs from California's eastern border with Arizona for about 60 miles west into the Imperial Valley. Diversion into the AAC occurs at the Imperial Diversion Dam and desilting works, located on the Colorado River north of Yuma, Arizona. Water deliveries to IID through the AAC began in the early 1940s.

IID first established water rights in accordance with the water law of the State of California and now holds certificated rights to water from the Colorado River under state law. IID also has a water service contract with the Secretary for the delivery of Colorado River water pursuant to the authority granted to the Secretary in Section Five of the BCPA, 43 U.S.C. § 617d. Finally, IID holds a present perfected right in the amount of 2.6 maf as set forth in this Court's amended decree in *Arizona v. California*, issued on January 9, 1979. 439 U.S. 419 (1979); *see also* 126 S. Ct. 1543 (2006).

There is no useable groundwater in the IID water service area. The only source of water for growers within the IID service area, and the numerous small urban communities in the Imperial Valley, is surface water from the Colorado River. Any interruption or diminution in delivery of water from the Colorado River to the Imperial Valley farm

community would result in significant and dramatic economic impact, especially in the warm summer months. IID and the Imperial Valley community depend exclusively on the waters of the Colorado River under contracts with the Secretary.

D. The Metropolitan Water District of Southern California

The Metropolitan Water District of Southern California ("Metropolitan") is a consortium of 26 cities and water districts providing drinking water to 18 million people in parts of Los Angeles, Orange, San Diego, Riverside, San Bernardino, and Ventura Counties. It is a public agency established by the California legislature in 1928. CAL. WATER CODE App. §§ 109-1, *et seq.* Metropolitan's members, in turn, provide water directly to homes, businesses, and other retail customers or to water purveyors who do so. Metropolitan currently delivers an average of 1.9 maf of water per year to a 5,200 square mile service area. The service area stretches some 200 miles along the coastal plain of Southern California and encompasses parts of six Southern California counties. Metropolitan acts essentially as a "wholesaler" of water to its Southern California water agency members, many of which distribute water to end-users from local sources as well as from Metropolitan. Metropolitan's water supply is a vital part of the infrastructure supporting a $700 billion regional economy in Southern California.

Metropolitan receives imported water from two principal sources: the Colorado River via the Colorado River Aqueduct, and the rivers draining to the San Francisco Bay-Sacramento and San Joaquin River Delta via the California Aqueduct of the California Department of Water Resources' State Water Project. Under contracts with the Secretary, Metropolitan has contractual rights to consumptive use of 1.212 maf of Colorado River water stored in Lake Mead. In addition to those contracts, Metropolitan also has a contract with the Secretary for the delivery of surplus flows from the

Colorado River. Metropolitan and other southern California purchasers also hold power contracts with the United States to purchase power from Hoover Dam.

E. San Diego County Water Authority

The San Diego County Water Authority ("SDCWA") is a public agency serving the San Diego region of Southern California as a wholesale supplier of water. CAL. WAT. CODE App., Chapter 45. SDCWA supplies water to approximately three million people—over 90 percent of the population of San Diego County—to support the region's $142 billion economy.

SDCWA is a member agency of Metropolitan and the largest consumer of Metropolitan-supplied water. Metropolitan provides between 75 and 90 percent of the water consumed annually within the SDCWA service territory: approximately 600,000 to 700,000 acre-feet of water per year. SDCWA has contracted to receive up to 277,700 acre-feet per year of conserved Colorado River water: 200,000 acre-feet per year of water conserved initially by land fallowing and then by efficiency improvements to delivery and farming operations within the Imperial Valley through a transfer agreement with IID; and 77,700 acre-feet per year through agreements with the United States, IID, Coachella Valley Water District, and Metropolitan.

F. Western Urban Water Coalition

The Western Urban Water Coalition ("WUWC") is a national association of municipal water utilities, currently serving over 35 million urban water consumers in the west's largest metropolitan areas in Arizona, California, Colorado, Nevada, Utah and Washington. WUWC's water supplier members include the following urban water utilities that have an interest in the issues in the case at bar: Arizona—Central Arizona Project, City of Phoenix, City of Tucson;

California—East Bay Municipal Utility District, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utility Commission, Santa Clara Valley Water District; Colorado-Denver Water Department, City of Aurora; and Nevada—Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority.

The organization is an unincorporated association established in 1992 to promote an understanding of the water needs of western cities. WUWC's charter is to provide a reliable, high-quality urban water supply for present and future water users. The WUWC is organized to help achieve that goal through water policies, programs and regulations.

Members of the WUWC own and operate water supply projects and, in many instances, wastewater treatment facilities. These projects consist of water conduits, reservoirs, hydroelectric facilities, power houses, transmission lines, and other facilities involved in water supply. These facilities are essential to the ability of WUWC members to fulfill their mission of serving the water resource-related needs of the majority of the populations of the western states. All WUWC members operate in states that have delegated NPDES authority under the Clean Water Act (including Arizona, at issue here), and all WUWC members either currently hold, or are applying for, such permits, which are integral to the operation of their utility systems.

STATEMENT OF THE CASE

Amici file this brief in support of the petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946 (9th Cir. 2005), *petitions for cert. filed*, 75 U.S.L.W. 3106 (U.S. Sept. 6, 2006) (No. 06-340), 75 U.S.L.W. 3235 (U.S. Oct. 23, 2006) (No. 06-549), filed by the United States Environmental

Protection Agency ("EPA") and by the National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce and American Forest & Paper Association.

The panel invalidated EPA's transfer of the CWA National Pollutant Discharge Elimination System ("NPDES") permit program to Arizona, erroneously interpreting the ESA as expanding the obligation of EPA to act without regard to the statutory mandates or constraints placed on EPA by other Acts of Congress (here, the CWA). Under the CWA, the NPDES program is administered by EPA unless the program is transferred to the State. If the State meets nine criteria specified in CWA Section 402(b), the CWA provides that EPA "shall approve each such submitted program unless [it] determines that adequate authority does not exist" to ensure that the nine specified criteria are satisfied. 33 U.S.C. 1342(b). When EPA administers the NPDES program, EPA will consult with the FWS whenever an action taken under the program "may affect" listed species. Once the program is transferred, however, the State, not being a federal agency, will not be obligated to enter into consultation with the FWS under the federal ESA.

EPA found that Arizona had met all the requirements of Section 402(b) and approved the State of Arizona's application to administer the NPDES program. That finding is not disputed by any party. Instead, Defenders of Wildlife and other environmental groups contended that EPA violated Section 7(a)(2) because EPA did not sufficiently analyze the effects of the loss of Section 7 consultation when EPA transferred the permit program to Arizona. The court of appeals agreed and invalidated EPA's approval of transfer on the grounds that ESA Section 7(a)(2) creates independent

authority beyond the EPA's statutory authority and that authority overrides any constraints imposed by Congress under the CWA.

The decision creates uncertainty about the scope of a federal agency's obligation to act within its organic authority despite Section 7(a)(2) of the ESA. The decision, therefore, threatens Reclamation projects throughout the west, including its Colorado River water and power facilities, creating uncertainty over Reclamation's obligation to act in accord with the Law of the River[3] in implementing its contracts with *Amici*.

ESA Section 7(a)(2) consultation is explicitly limited to actions "in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added); *see Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996). The court of appeals wrongly held that Section 7(a)(2) applies even if a federal agency has no discretion under the law governing the conduct of the agency to act. The proper limits of ESA consultation are of exceptional importance to *Amici* in the context of the scope of the Secretary's discretion in carrying out duties involving western water and power contracts. If a court finds that the Secretary must modify the rights and duties under an existing contract to other uses claimed to be beneficial, notwithstanding statutory or contractual limitations, *Amici's* contracts are at risk.

Amici's concern, therefore, is not only the implications of the panel's decision on the NPDES program nationwide, but also the potential impact the decision will have on future water and power operations and rights to water and power

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[3] The Law of the River collectively refers to the 1944 bilateral treaty between the United States and Mexico, the Treaty for the Utilization of Waters of Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., Feb. 3, 1944, 3 U.N.T.S. 313, the compacts, laws, and cases that govern the allocation of Colorado River water.

under contracts with Reclamation or other federal entities. This Court should grant the petitions for writ of certiorari to hear arguments why Section 7(a)(2) of the ESA does not apply to the nondiscretionary act of CWA permitting authority delegation to the States. Accepting review will also allow the Court to confirm that Section 7(a)(2) does not apply to other statutory mandates or constraints. *Amici* rely on the property rights they have been granted to provide water and power to millions of people. Whether Section 7(a)(2) overrides statutory mandates or constraints placed on an agency by other Acts of Congress or other binding legal obligations is critical to the security of *Amici's* rights and the well-being of the communities served by their projects.

The court of appeals' decision impermissibly expands the Section 7(a)(2) consultation requirement under the ESA, contrary to applicable regulations and in direct conflict with the decisions of the Courts of Appeals for the Fifth and D.C. Circuits. This Court should grant the petition for writ of certiorari to make clear that ESA Section 7(a)(2) does not override other statutory mandates or constraints placed on an agency's discretion by other Acts of Congress, contracts, treaties, or other binding legal obligations.

REASONS FOR GRANTING THE PETITION

I. THE ISSUE OF WHEN ESA CONSULTATION IS REQUIRED IS OF EXCEPTIONAL IMPORTANCE.

Amici have devoted considerable resources monitoring and participating in cases across the country where plaintiffs sought to require agencies to disregard binding water and power obligations and to force deference to ESA Section 7(a)(2) for the benefit of listed species where such deference is not required under the law. In these challenges, there is a common legal thread—whether the ESA abrogates the pre-existing specific obligations of federal agencies under their

governing statutes and contracts. *Amici* have consistently argued that where federal agencies have no discretion to undertake actions under federal law, or under contracts entered into under those federal laws, the federal agencies have no duty to consult under Section 7(a)(2) of the ESA. Any overly broad construction of the Section 7(a)(2) consultation authority that would allow Reclamation unilaterally to reduce water deliveries and divert water to other uses would impermissibly expand Reclamation's existing authority under its organic statutes.

The ESA directs the action agency to use its existing authorities to carry out the ESA's objectives, including the avoidance of jeopardy. The ESA does not expand the authority of the acting agency. The question under the ESA is whether the agency is taking discretionary action pursuant to its authorities. EPA does not have such discretion under the CWA to delegate NPDES permitting authority to the States, nor does Reclamation have discretion under the contracts to unilaterally redirect water or power for any purpose.

In *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003) ("*Defenders*"),[4] the D.C. District Court held that Reclamation's duty to consult with other agencies under the ESA does not extend to operations affecting species downstream from river flows over which Reclamation had no discretionary control. In *Defenders*, the Plaintiffs challenged Reclamation's management of the lower Colorado River, arguing that Reclamation should send more water to Mexico for the benefit of listed species found there. Reclamation had consulted under ESA Section 7(a)(2) regarding certain operations, but concluded that no formal consultation was required regarding the Totoaba Bass, classified as endemic to

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[4] *Amici* APA, CAWCD, IID, Metropolitan, and SDCWA filed an amicus brief in *Defenders of Wildlife v. Norton* on the proper scope of Reclamation's discretion and how it should be viewed in light of the ESA.

Mexico, because Reclamation lacked any discretion over water deliveries to or within Mexico under treaties and this Court's decision in *Arizona v. California*, and therefore had no ability to reverse conditions in the Colorado River delta in Mexico. *Id.* at 66. FWS and the National Marine Fisheries Service ("NMFS") agreed. *Id.* at 67.

The court's decision that ESA consultation was not required turned on a finding that Reclamation had no authority to divert water for the benefit of species in Mexico:

> The record contains no suggestion of a way, with or without consultation [under Section 7(a)(2) of the ESA], for Reclamation to ensure that more water reaches the listed species in the delta. The formulas established by the Law of the River strictly limit Reclamation's authority to release additional waters to Mexico, and Section 7(a)(2) of the ESA does not loosen those limitations or expand Reclamation's authority.

Id. at 67-68 (citing *Arizona v. California*, 376 U.S. 340 (1964)).

The court emphasized the limited scope of the Secretary's discretion under the Law of the River in determining that consultation under ESA Section 7(a)(2) was not required because no diversion of water to benefit species was allowed: "[I]t seems unlikely that any case will present facts that more clearly make any agency's actions nondiscretionary than this one: a Supreme Court injunction, an international treaty, federal statues, and contracts between the government and water users that account for every acre foot of lower Colorado River water." *Id.* at 69.

In *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, Case Nos. 05-2399, 06-2020, 06-2021 (consolidated) (10th Cir. filed Dec. 29, 2005) ("*Silvery Minnow*"), the U.S. Court of Appeals for the Tenth Circuit is faced with a similar issue arising from a district court decision misconstruing the

ESA to impose new obligations on Reclamation. In *Silvery Minnow*, Plaintiffs sought to require Reclamation to release water or to restrict the Middle Rio Grande Conservancy District's ("MRGCD") diversions of water for the benefit of the silvery minnow. FWS issued a Biological Opinion ("BiOp") concluding it was not feasible for Reclamation to release water for the silvery minnow. The district court rejected the BiOp and ordered Reclamation to make releases or restrict MRGCD's diversions. *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222 (D.N.M. 2002).[5] The district court erroneously transmuted the ESA's requirement that Reclamation consult on its discretionary actions into a substantive command that Reclamation unilaterally divert contractually-allocated water from long-standing Reclamation

[5] On appeal from the district court's opinion, the Court of Appeals for the Tenth Circuit affirmed, 333 F.3d 1109 (10th Cir. 2003), but subsequently vacated its affirmation when the issue on appeal became moot during the pendency of petitions for rehearing en banc. 355 F.3d 1215 (10th Cir. 2004). On remand, Defendants argued that Plaintiffs' claims were moot due to intervening events, including the issuance of a new BiOp and Congressional legislation regarding the projects at issue in the litigation. Defendants moved to vacate the district court's earlier memorandum opinions (which misconstrued the ESA's requirement that Reclamation consult on its discretionary actions) because those opinions were not subject to full and final appeals. In its November 22, 2005 opinion, the district court, among other things, declined to vacate its earlier opinion. *Rio Grande Silvery Minnow v. Keys*, No. 99-1320 (D.N.M. Nov. 22, 2005) (order and final judgment). The district court also entered a permanent injunction requiring the Federal Defendants to apply the conclusions in its April 19, 2002 and September 23, 2002 Memorandum Opinions as to the scope of Reclamation's discretion over the Middle Rio Grande Project in all future ESA consultations on project operations. The district court's November 22, 2005 decision is the subject of the appeal now pending before the Court of Appeals for the Tenth Circuit.

contractors for the benefit of the silvery minnow.[6] The 10th Circuit must now determine what federal actions are properly subject to Section 7(a)(2) consultation.[7]

The ESA does not give an agency new authority above and beyond its underlying organic authority. But the court of appeals' decision here does just that: "[D]espite FWS's regulation, the majority finds that the ESA applies to anything 'authorized, funded, or carried out' by a federal agency, ... whether discretionary or not." *Defenders of Wildlife v. U.S. EPA*, 450 F.3d 394, 398 (9th Cir. 2006) (Kozinski, J. *dissenting from en banc reh'g denied*). The decision thus eliminates discretion as a prerequisite to the obligation to consult and renders 50 C.F.R. § 402.03 meaningless.

If the panel's decision stands, arguably all federal agencies would have an independent, affirmative obligation above and beyond their underlying authorities to act under ESA Section 7(a)(2):

> We hold that approving Arizona's pollution permitting transfer application was an agency action "authorized" by the EPA, thus triggering both section 7(a)(2)'s consultation requirement and its mandate that agencies not affirmatively take actions that are likely to jeopardize listed species. The EPA may have complied with its obligations under the Clean Water Act, but compliance with a "complementary" statute cannot relieve the EPA of its *independent obligations* under section 7(a)(2).

Defenders of Wildlife, 420 F.3d at 971 (emphasis added). Under the majority's decision, regardless whether the agency

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[6] Of course, there is always room for Reclamation or local authorities to take voluntary action to acquire water supplies or resources from willing sellers to benefit protected species.

[7] *Amici* APA, CAWCD, IID, and Metropolitan filed an amicus brief in support of the United States in *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, No. 05-2399 (10th Cir. filed June 26, 2006).

has any discretion to take action to benefit listed species, the agency would be obliged to act. This would enlarge the scope of the ESA Section 7(a)(2) consultation requirement so as to trump all other statutes.[8]

II. THE NINTH CIRCUIT OPINION CREATES A DIRECT CONFLICT WITH OTHER FEDERAL CIRCUITS REGARDING THE APPLICABILITY OF ESA SECTION 7(A)(2) TO NON-DISCRETIONARY FEDERAL ACTIONS.

The court of appeals' decision directly conflicts with the Fifth Circuit's decision in *American Forest and Paper Ass'n v. U.S. EPA*, 137 F.3d 291 (5th Cir. 1998) ("*AFPA*") and the D.C. Circuit's decision in *Platte River Whooping Crane Critical Habitat Maint. Trust v. Federal Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992) ("*Platte River*").

AFPA involved EPA's approval of Louisiana's NPDES permitting program under CWA § 402(b), the precise agency

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[8] While *Amici* focus here on the impact of the court of appeals' decision on water contracts with the Secretary of the Interior, there are a host of other contexts potentially affected by the panel's decision. *See, e.g., Ground Zero Ctr. for Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082, 1091-92 (9th Cir. 2004) (holding that the ESA did not require the Navy to consult with NMFS about whether an accident would jeopardize the continued existence, or adversely affect the nearby critical habitat, of threatened salmon species because the Navy had limited discretion in implementing the project at issue); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 975-76 (9th Cir. 2003) (finding that because the plain language of the High Seas Fishing Compliance Act entrusted the NMFS with substantial discretion to condition permits to inure to the benefit of listed species, the ESA required that the NMFS conduct consultation to assess the potential impact to protected species); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1081 (9th Cir. 2001) (holding that while the FWS retained certain discretion over Simpson Timber's activities, they did not "retain discretionary control to make new requirements to protect species that subsequently might be listed as endangered or threatened").

action at issue in the case at bar. As a condition of its approval of the Louisiana program, EPA required Louisiana to consult with FWS and NMFS before issuing permits. The Fifth Circuit found that the CWA did not authorize EPA to impose the consultation condition and that, under the CWA, EPA lacked authority to impose conditions to benefit listed species. *Id.* at 298.

In *AFPA*, EPA argued that its decision to consider endangered species "is not only authorized but compelled by ESA § 7(a)(2)." *Id.* at 297. The court rejected this interpretation of the ESA:

> The flaw in this argument is that if EPA lacks the power to add additional criteria [under the CWA], nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers.

Id. at 298. The Fifth Circuit concluded that EPA could not invoke the ESA "as a means of creating and imposing requirements" not authorized by the CWA. *Id.* at 299.

The D.C. Circuit has also rejected a challenge seeking to expand agency authority under the ESA. In *Platte River*, environmental groups brought a challenge to annual licenses issued to two hydroelectric projects on the Platte River by the Federal Energy Regulatory Commission ("FERC"). Under the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, FERC was precluded from amending the annual licenses given to a hydroelectric plant. For that reason, FERC could not insert wildlife protective conditions into the licenses when they were renewed. *Platte River*, 962 F.2d at 32.

The groups argued that, notwithstanding the statutory limits of the Federal Power Act, FERC had an affirmative obligation to impose conditions to protect listed species under ESA Section 7(a)(2). *Id.* at 33. The D.C. Circuit rejected that

argument: "[T]he statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act." *Id.* at 34 (emphasis in original).

The panel below acknowledged that there was "an existing intercircuit conflict on the question before us," comparing *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989) and *Conservation Law Found. of New England, Inc. v. Andrus*, 623 F.2d 712 (1st Cir. 1979) with *AFPA* and *Platte River*. The court of appeals did not find the D.C. Circuit and Fifth Circuit decisions persuasive, but instead said it was relying on decisions from the First and Eighth Circuits. *Defenders of Wildlife*, 420 F.3d at 970. As Judge Kozinski explained in his dissent from the court of appeals' denial of en banc review, those cases are inapposite:

> The First and Eighth Circuit cases, however, do not support the majority's position. Both cases addressed situations where the governing statute and the ESA were complementary, not where the governing statute *precluded* consideration of endangered species as the CWA does.

Defenders of Wildlife, 450 F.3d at 401 n.5 (emphasis in original). *Conservation Law Foundation* involved the sale of offshore leases for oil and gas exploration under the Outer Continental Shelf Lands Act. The First Circuit held that the ESA would continue to apply to future discretionary actions taken after the lease sale was held. 623 F.2d at 715.

In *Defenders of Wildlife v. Administrator, EPA*, the issue was whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, exempted EPA from complying with ESA requirements when registering pesticides. 882 F.2d 1294. The Eighth Circuit found FIFRA's provision that a pesticide may be registered only if it does not cause "unreasonable adverse effects" to be consistent with ESA requirements. Thus, the Eighth Circuit

held that EPA was not exempt from complying with the ESA under FIFRA and concluded that three EPA registrations of strychnine constituted a "taking" under Section 9 of the ESA. But the court did not find a violation of Section 7(a)(2).

The Ninth Circuit's decision reads the ESA to provide sweeping independent authority, and indeed an affirmative duty beyond an agency's statutory authority, to protect endangered species regardless of the statutory limitations imposed on that agency. Even if the court of appeals' reading of *Conservation Law Foundation* and *Defenders of Wildlife* were correct, the Ninth Circuit's decision squarely conflicts with the Fifth and D.C. Circuits and has potentially far-reaching effects on water and power deliveries to millions of citizens throughout the west.

CONCLUSION

For all of the foregoing reasons, the petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

VIRGINIA S. ALBRECHT
Counsel of Record
KARMA B. BROWN
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

KATHY ROBB
HUNTON & WILLIAMS LLP
200 Park Avenue
New York, NY 1016
(212) 309-1128

Counsel for *Amici Curiae*

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